

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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NANCY PERRY, Personal Representative of the  
Estate of KEYA A. PERRY, Deceased.

UNPUBLISHED  
April 30, 2002

Plaintiff-Appellant,

v

KATHLEEN MCCAHERILL, SANDRA SKOLNIK,  
JANE JACKSON, and JOHN MILLS,

No. 224556  
Wayne Circuit Court  
LC No. 98-823244-NO

Defendants-Appellees,

and

WAYNE-WESTLAND SCHOOL DISTRICT,  
LILLIAN LONGUSKI, JANICE KRYM, LINDA  
ANOLICK, CITY OF WESTLAND, and CITY OF  
WAYNE,

Defendants.

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Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

In this wrongful death action, plaintiff appeals as of right from the circuit court's order granting summary disposition in favor of defendants Kathleen McCahill, Sandra Skolnik, Jane Jackson, and John Mills, on the ground that defendants, who were governmental employees, were immune because their conduct did not amount to gross negligence. We affirm in part and reverse in part.

Plaintiff's decedent, Keya A. Perry (hereafter Keya), was a twenty-five-year-old special education student in the Wayne-Westland School District. She was severely mentally impaired with a mental capacity of a four-year-old child, was deaf, and had a history of seizure disorder for which she was taking medication. A portion of Keya's curriculum included supervised aquatic activity at the Dyer Center Pool. Her aquatics instructor, defendant Sandra Skolnik, testified that Keya could get in and out of the pool by herself, swim using the breast stroke, and float, glide and kick. She also liked to swim underwater.

On October 10, 1997, Keya was one of six special education students in the adapted (or adaptive) aquatics class. She was the only student in the deep end of the pool. In addition to Skolnik, two paraprofessionals, defendants Kathleen McCahill and Jane Jackson, were in the pool. Skolnik and Jackson were certified lifeguards. Skolnik was in charge of the pool. Defendant John Mills, who was not present at the pool on October 10, 1997, was Skolnik's immediate supervisor and in charge of the adapted aquatics program. The staff in the pool were not assigned to individual students but utilized a "guarding pattern," which essentially meant that one staff member was in the deep end of the pool, if any students were there, one in the middle, and one at the shallow end. There was no lifeguard stationed on the deck of the pool who was specifically assigned to lifeguarding duties, although other staff personnel were apparently present on the deck. The staff on the deck were responsible for supervising students who were removed from the pool to use the bathroom and to respond to any requests for assistance from the staff in the pool.

Skolnik testified that, after Keya had been in the pool for five or six minutes, she observed Keya turn her head to the side, let out a large bubble of air, and stop moving. Skolnik was approximately fifteen feet away and swam to Keya when she saw the bubble, rolled Keya over and put her against the side of the pool. She gave Keya two quick breaths and, with Jackson's help, carried her down to the shallow end of the pool to remove her from the pool. Skolnik began CPR, but Keya had no pulse and was not breathing. An EMS paramedic also attempted to resuscitate Keya, but was unsuccessful.

The medical examiner's case summary stated in the "police comments" section that defendant Mills had told the police that an attendant observed Keya stand in the water and begin "thrashing about as though she were having a seizure." At deposition, Mills testified that he did not remember anybody telling him that Keya had been observed in the pool thrashing her arms before Skolnik went to her, and that he did not recall ever telling the police or the medical examiners that Keya had been observed thrashing her arms.<sup>1</sup> Keya's last recorded seizure was in April 1991. The medical examiner noted Keya's history of seizure disorder, the fact that the autopsy revealed a fresh bite mark on Keya's tongue, and the reports of witnesses that Keya had a seizure in the pool, and concluded that Keya died a natural death caused by seizure disorder.

The paramedic testified at deposition that Keya had water in her lungs and opined that she therefore died from drowning. The hospital emergency room doctor reported that Keya died from drowning with cardiac arrest. Plaintiff's medical expert, a forensic pathologist, opined that Keya died of an accidental drowning. He based his opinion on the fact that Keya was a mentally retarded woman in a pool, wearing a flotation device that was not designed to keep her head out of water, that she apparently was face down in the pool for some period of time, and that there was no other apparent direct cause of death. He noted that death from a seizure alone was unusual and that, when a seizure was involved in a death, there was usually some other intervening factor, such as a vehicular accident or drowning. Defendant's medical expert, a neurologist, excluded drowning as a cause of death based on Skolnik's deposition testimony that

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<sup>1</sup> Skolnik and Jackson each denied telling anyone that Keya appeared to have a seizure in the pool.

Keya was under water for only a short time and opined that Keya died from a seizure, because no other cause of death was apparent.

Plaintiff's action against defendants, all employees of Wayne-Westland School District, is governed by MCL 691.1407(2). Under this statute, governmental employees acting within the scope of their authority are generally immune from tort liability, provided that their actions are not grossly negligent. *Maiden v Rozwood*, 461 Mich 109, 121-122; 597 NW2d 817 (1999). Evidence of ordinary negligence does not create a material question of fact concerning gross negligence. *Id.* at 122-123. A plaintiff must adduce evidence of conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Id.* at 123. The gross negligence must be "the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause." *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). In addition, the substance of the plaintiff's proofs must be admissible as evidence. *Maiden, supra* at 123.

Plaintiff argues that the circuit court, in granting summary disposition to defendants, improperly found as a matter of law that defendants' conduct did not amount to gross negligence. Plaintiff contends that the court impermissibly made factual findings concerning the adequacy of defendants' supervision of Keya, the life-guarding at the pool, and the flotation device worn by Keya, because sufficient evidence was presented to create questions of fact for the jury as to these matters.

The circuit court determined, based on the medical examiner's report, that the cause of death was seizure. The court noted, however, that the cause of death was not dispositive to its decision. Plaintiff, however, has presented evidence sufficient to raise a question of fact about the cause and manner of Keya's death. For the purpose of reviewing the grant of this motion, we view the evidence in the light most favorable to plaintiff. *Maiden, supra* at 119-120. We must therefore assume that Keya died from accidental drowning. However, this assumption, by itself, does not lead to a conclusion that defendants were grossly negligent. As noted in *Maiden, supra* at 127 n 10, "[t]o establish gross negligence as statutorily defined, the plaintiff must focus on the actions of the governmental employee, not on the result of those actions." *Id.* at 127 n 10.

Plaintiff's allegations of gross negligence revolve around her claims that defendants failed to properly supervise Keya, failed to have a lifeguard stationed on the deck of the pool, and utilized a flotation device that did not keep Keya's head above water. Regarding plaintiff's claims of failure to properly supervise and failure to have a lifeguard on the deck, plaintiff presented the deposition testimony of Stanley Shulman, a consultant and retired physical education teacher and coach,<sup>2</sup> who opined that defendants were grossly negligent in not

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<sup>2</sup> Defendants contend that because plaintiff's expert, Stanley Shulman, had no experience with adaptive aquatics, he was not qualified to render an opinion regarding the presence of a lifeguard on deck at the pool. Defendants contend that Shulman's deposition testimony therefore does not constitute admissible evidence sufficient to withstand summary disposition. Although defendants argue that Shulman's experience was only in recreational swimming, his resume and testimony demonstrate that his experience was in physical education, including mainstreamed handicapped students. Further, although defendants argue that the requirements of a lifeguard are different for adapted aquatics and recreational swimming, plaintiff presented a position paper

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providing one-to-one supervision of Keya, a seizure-prone person who was also severely mentally retarded and deaf. Shulman noted that the Michigan Department of Health Rule 325.2198 required that lifeguard service be provided at all times in a swimming pool owned or used by the schools. Shulman noted that both the American Red Cross<sup>3</sup> and the American Aquatics Programming Professional Guide recommended close and careful supervision of children with seizure disorders and that holding the breath should be discouraged for such individuals. Further, there was evidence from which a fact-finder could conclude that the two persons present that were trained as lifeguards, Skolnik and Jackson, who were in the pool, were not scanning the pool or watching the students at all times because they conversed and had other duties, such as adjusting the flotation vests of each swimmer. Although at his deposition, Shulman could identify no rule or statute that expressly stated that a lifeguard must be *on the deck* of the pool, he testified that the guidelines and procedures for Dyer Center Pool,<sup>4</sup> where the instant adapted aquatics class took place, mandated that a lifeguard be on deck at all times. Shulman testified that that Dyer pool requirement was consistent with American Red Cross standards for lifeguards. Shulman relied on and read from a number of publications at his deposition that were marked as exhibits thereto, including a Red Cross publication, *Lifeguarding Today*, which advises that lifeguards can perform their function from an elevated stand or from the deck of a pool but cannot safely perform their duties while teaching a lesson; the Red Cross therefore advises that facilities have a lifeguard separate and apart from the person instructing such activities. The publication also advises that a passive drowning victim should be removed from the water immediately so that emergency care can be provided. Another publication, *Adaptive Aquatics Programming: A Professional Guide*, advises that supervision in adaptive aquatics programs should include the use of lifeguards as well as instructors and that the instructor-to-student ratio should reflect the ability to provide a satisfying educational activity in a safe environment. Specific rules should be established based on the needs of the individuals using the pool and the purpose and type of program activity. According to *Adapted Aquatics: A Position Paper of the Aquatic Council*, instructional swimming should take place under the supervision of a lifeguard, whose sole responsibility is surveillance of participants. The position paper states that “all safety rules/ participation safeguards applicable in regular programs apply to adapted aquatics,” and that flotation devices should only be used under direct supervision of an instructor, should not substitute for lifeguard surveillance, and should only be used until independence or appropriate skills can be developed.

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from the Aquatic Council that stated that all safety precautions utilized in regular programs should be used in adapted aquatics. Shulman was the former athletic director of a middle school education department and a teacher of physical education, lifeguard, swimming consultant, certified water safety instructor, and a member of organizations including the Aquatics Council of the American Alliance for Health, Physical Education, Recreation and Dance, and the Council for National Cooperation in Aquatics. Defendants have not shown that Shulman was not qualified to render an opinion on the use of an on-deck lifeguard.

<sup>3</sup> Skolnik testified on deposition that she and her staff were trained under American Red Cross guidelines, that Red Cross guidelines were regularly referred to and that she used American Red Cross guidelines at the Dyer Center Pool in addition to the Dyer Center Pool’s guidelines.

<sup>4</sup> The Dyer Center Pool guidelines and procedures were marked as an exhibit at Shulman’s deposition, and Shulman read portions of them into the record.

Plaintiff's water survival expert, Wayne Williams, testified that he was not aware of any Michigan statute or case law requiring that a lifeguard be stationed outside the water. Williams testified that the supervisors in the pool had the physical ability, if they were looking, to see Keya at all times, but not as well as a lifeguard stationed outside the pool, and that a person with Keya's limitations warranted one on one supervision given her risk factors.

We conclude that plaintiff presented sufficient evidence to create a triable issue of fact regarding whether the supervision of the adapted aquatics class—which would include the lack of a lifeguard positioned on the deck of the pool, the use of zone guarding rather than specifically assigned students, and the lack of one-on-one supervision of an individual who was severely mentally impaired, deaf, and seizure-prone—amounted to gross negligence. Plaintiff presented evidence of standards put forth by professional organizations through the testimony of an expert witness. Having done this, the reasonableness of the defendants' conduct should be determined by the trier of fact, so long as reasonable minds could differ based on the evidence presented. *Jackson v Saginaw County*, 458 Mich 141, 146; 580 NW2d 870 (1998). Here, plaintiff established a genuine issue of fact with regard to whether the supervision of Keya was so inadequate as to demonstrate a substantial lack of concern for whether an injury resulted.

Defendants also argue that plaintiff has not shown that the lack of a lifeguard was the proximate cause of Keya's death because there was no evidence that Keya was not being watched. However, plaintiff presented evidence that Skolnik, who testified that she never took her eyes off Keya after Keya entered the pool, had conversations with Krym at the side of the pool and with Jackson, who was stationed in the shallow end of the pool. In addition, Skolnik testified that she personally adjusted the flotation devices of each student in the pool and personally gave assignments to each student in the pool by swimming to the student and instructing them. Jackson testified that she and Skolnik had discussed switching places in the pool just before they noticed that something was wrong with Keya. From this evidence, reasonable minds could conclude that Keya was not adequately watched and that the presence of an on-deck lifeguard, with sole responsibility to constantly scan the pool, might have prevented Keya's death.

Defendants further argue that plaintiff has "lumped together" the allegations of gross negligence without segregating the allegations for each defendant. We agree. The question whether the supervision of Keya amounted to gross negligence pertains to only two defendants: Sandra Skolnik, the adaptive aquatics instructor of Keya's class in charge of the pool that day, and the person responsible for writing and implementing the aquatics portion of the students' individual education plan, and responsible for supervising the deep end of the pool where Keya was swimming, and John Mills, director of the school district's special education program, Skolnik's direct supervisor, and the person responsible for setting up the responsibilities for supervising adapted aquatics students and for establishing the staffing ratio. Plaintiff presented no evidence that would allow a reasonable fact-finder to conclude that defendants Jane Jackson or Kathleen McCahill, who were paraprofessionals assisting Skolnik in the pool and were not responsible for the supervision of the area in which Keya was swimming, were grossly negligent. Thus, the circuit court properly granted summary disposition as to defendants Jackson and McCahill.

Regarding plaintiff's allegation that defendants were grossly negligent in utilizing a flotation device that failed to keep Keya's head out of the water, plaintiff presented Shulman's

testimony that flotation devices were best used as teaching aids and not as safety devices, and the opinion of water safety expert Wayne Williams that Keya should not have been allowed to swim under water wearing the flotation device and that a better device would have kept her face out of the water. However, plaintiff presented no evidence of a standard of care mandating any flotation devices for mentally impaired or seizure-prone individuals. As such, plaintiff has not shown a violation of any standard with regard to defendants' use of the flotation device for Keya, and reasonable minds could not find that defendants were grossly negligent for using the device.

We affirm the circuit court's grant of summary disposition with regard to defendants McCahill and Jackson. However, we reverse the grant of summary disposition to defendants Skolnik and Mills, because reasonable minds could differ on whether the evidence established that their supervision of the pool and the adapted aquatics class amounted to gross negligence that was the proximate cause of Keya's death.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Jessica R. Cooper